UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

ELITE AMBULANCE INC.

and **31-CA-122353**
31-CA-122364
31-CA-128944
31-CA-131430

INTERNATIONAL ASSOCIATION OF EMTS AND PARAMEDICS (IAEP)/NAGE/SEIU LOCAL 5000

Roufeda E. Elgamil, Esq.,
for the General Counsel.
Linda Mouzon, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Dickie Montemayor, Administrative Law Judge. The International Association of EMTs and Paramedics (IAEP)/Nage/SEIU Local 5000 (the Union) filed charges which were consolidated in a complaint issued by the General Counsel on April 29, 2015, alleging violations by Elite Ambulance Inc. (Respondent) of Sections 8(a)(3) and (1) of the National Labor Relations Act, as amended (the Act). Respondent filed an answer. Pursuant to notice, the case was set for trial on December 14, 2015, in Los Angeles, California. Prior to the trial date, on December 3, 2015, a pretrial conference was scheduled in the matter. Respondent failed and/or refused to participate in the conference. The matter convened for trial on December 14, 2015, 2014. Respondent failed and/or refused to appear. Prior to the scheduled trial, General Counsel served a subpoena duces tecum on Respondent. (GC Exh. 9.) Respondent failed to comply with subpoena.

THE ADVERSE INFERENCE

As a result of Respondent's failure to comply with the subpoena, I invoked the adverse inference rule against Respondent. As noted by the court in *Int'l Union, United Auto., Aerospace*

& Agr. Implement Workers of Am. (UAW) v. N. L. R. B., 459 F.2d 1329, 1335-36 (D.C. Cir. 1972),

> [T]he Board's complex gyrations might lead the unwary to conclude that the adverse inference rule is one of those intricate gems of the common law which is riddled with nonsensical exceptions, encrusted with gloss upon gloss, and surrounded by an arcane lore last fully explicated in a three-volume treatise published in the late 19th century. In fact, however, the rule is disappointingly free of mystery and mumbo-jumbo. Indeed, it is more a product of common sense than of the common law. Simply stated, the rule provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him. As Professor Wigmore has said:"[T]he failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also always open to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such inference in general is not doubted." Although this rule can be traced as far back as 1722 when it was applied in the famous case of the chimney sweep's jewel, it has been utilized in scores of modern cases as well. See, e. g., *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226, 59 S.Ct. 467, 474, 83 L.Ed. 610 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse."); United States v. Roberson, 5 Cir., 233 F.2d 517, 519 (1956) ("Unquestionably the failure of a defendant in a civil case to testify or offer other evidence within his ability to produce and which would explain or rebut a case made by the other side, may, in a proper case, be considered as a circumstance against him and may raise a presumption that the evidence would not be favorable to his position."); *Tendler v. Jaffe*, 92 U.S.App.D.C. 2, 7, 203 F.2d 14, 19 (1953) ("[T]he omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause.").

The invocation of the adverse inference rule in this case carried with it both the presumption that had the Respondent produced the information sought by the General Counsel it would have reflected unfavorably on Respondent's position and secondly, I struck those parts of Respondent's answer that related to the same subject matter of the documents sought by General Counsel. See *Equipment Trucking Co*., 336 NLRB 277 (2001). The presumption that information sought would have reflected unfavorably upon Respondent is sufficient in and of itself to warrant an unfavorable decision against Respondent. See *McAllister Towing & Transportation*, 341 NLRB 394 (2004); *Carpenters Local 405*, 328 NLRB 788 (1999); *ADF Inc*., 355 NLRB No. 14 (2010).

Moreover, in as much as the subpoena sought information relating to each of those factual paragraphs which were denied by Respondent (paragraphs 2(b), 3, 5, 6, 7, 8, and 9) and each of those denials were stricken from the answer as a consequence of the adverse inference, the factual allegations upon which the complaint rests stand uncontested in light of Respondent's failure and/or refusal to appear at trial. Thus, a decision unfavorable to Respondent is also separately warranted on these grounds. See *KB In & Out, Inc., d/b/a Century Car Wash & Carwash Workers Org. Comm. of the United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied-Indus. & Serv. Workers Int'l Union, Afl-Cio*, 2014 WL 1871299 (2014). See also, *Transp. Solutions, Inc. & Gen. Teamsters, Chauffeurs & Helpers Local 249 a/w Int'l Bhd. of Teamsters,* 355 NLRB 136 (2010), *TNT Logistics N. Am., Inc. & Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW Region 2-b, & Its Local 101*, 344 NLRB 489 (2005).

Upon the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation engaged in the business of providing inter-facility ambulance services to customers located in Southern California, where it annually purchased and received at its Los Angeles Facility goods valued in excess of $50,000 directly from points outside the State of California. I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[1]

II. ALLEGED UNFAIR LABOR PRACTICES

1. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act:

Boris Khukrov – Owner/Manager[2]
Kris Thomas – Operations Manager

2. About December 20, 2013, Respondent, by Boris Khukhrov, at approximately 8:45 p.m. on the sidewalk in front of the Respondent's facility, threatened union representatives with violence, in the presence of employees.

3. About December 20, 2013, Respondent, by Boris Khukhrov, in the second floor conference room at Respondent's facility, told employees that there would not be a union at its facility, and

[1] Although in its answer Respondent asserted that the Board lacked jurisdiction over the matter, however in its Stipulated Election Agreement dated November 26, 2013, Respondent in fact admitted that it was an employer engaged in commerce within the meaning of 2(6) and (7) of the Act. See (GC Exh. 3).

[2] Although Khukrov's official title is not known, it is clear from the evidence presented at trial that he acted as a manager with both the actual and apparent authority to hire and fire employees and in fact both hired and disciplined employee Stacy Ardon.

informed its employees that it would be futile for them to select the Union as their bargaining representative.

4. About May 6, 2013, Respondent by Kris Thomas, in the manager's office facility, made a coercive statement telling employees that they would not receive a pay raise due to their support and activities on behalf of and in the presence of the Union.

5. About November 2013 and continuing Respondent decreased or withdrew benefits of its employees by failing to provide employees annual pay increases associated with their yearly performance evaluations. Respondent engaged in the conduct described above because the employees of Respondent formed, joined, assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. By the acts and conduct described above, Respondent has interfered with, restrained, and/or coerced employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(a) of the Act,

3. Respondent violated Section 8(a)(3) and (1) of the Act by discriminating in regard to the hire, tenure, or terms and conditions of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

4. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel, in addition to the standard remedy for 8(a)(1) and (3) cases, requests that the Respondent be required to read the notice to the employees at a meeting held on worktime. As noted above, the complaint alleged and I found that Respondent through Khukhrov threatened a union representative with violence. (A cell phone video recording documenting the threats appears in the record at GC Exh. 7.) In view of the openly violent and threatening language and conduct exhibited by Respondent, in addition to posting a notice that assures its employees that it will respect their rights under the Act, the notice shall also be read to employees during working time. Reading the notice to the employees in the presence of a responsible management official serves as a minimal acknowledgement of the obligations that have been imposed by law and provides employees with some assurance that their rights under the Act will be respected into the future. *Whitesell Corp.,* 357 NLRB No. 97, slip op. at 6, (2011). By reading to the employees assembled for that purpose only on company time will enable the employees to fully perceive that the Respondent and its managers are bound by the

requirements of the Act. *Federated Logistics*, 340 NLRB 255, 258 (2003). Accordingly, the Respondent shall be required to hold a meeting or meetings scheduled to ensure the widest possible attendance on each shift at which a responsible management officials Khukrov and Thomas will read the notice. The notice shall be read in the presence of a Board agent or, at the Respondent's option, a Board agent will read the notice in the presence of the responsible management officials of the Respondent. The reading will take place at a time when Respondent would customarily hold meetings and must be completed within 14 days after service by the Region of the Board's Order. The date and times of the reading must be approved by the Regional Director. The announcement of the meeting will be in the same manner that Respondent normally announces meetings and must be approved by the Regional Director.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Company, Elite Ambulance, Inc., their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that it would be futile for them to opt for union representation.

(b) Threatening union representatives with violence in the presence of employees.

(c) Telling employees that it cannot pay annual increases because of INTERNATIONAL ASSOCIATION OF EMTS AND PARAMEDICS (IAEP)/NAGE/SEIU LOCAL 5000, the Union.

(d) Withholding and continuing to withhold annual pay increases associated with their yearly performance reviews from its employees because they engaged in union activities, and to discourage employees from engaging in union activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, make whole all employees who would have received wage increases linked to their performance evaluations who were not granted wage increases from November 2013 through the present.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amounts due under the terms of this Order.

(c) Within 14 days after service by the Region of the Board's Order, post at its facility in Los Angeles, California, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 31 after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Company customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since November 1, 2013.

(d) Within 14 days after service by the Region of the Board's Order, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees by Boris Khukrov in the presence of a Board agent or, at the Respondent's option, by a Board agent in the presence of responsible management officials, including, but not limited to, Boris Khukrov and Kris Thomas.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.[4]

Dated, Washington, D.C. December 23, 2015

Dickie Montemayor
Administrative Law Judge

[4] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading, "posted by Order of the National Labor Relations Board Shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT threaten union representatives with violence in the presence of employees.

WE WILL NOT tell you that a union cannot help you if it wins the election.

WE WILL NOT tell you that we cannot pay wage increases because of INTERNATIONAL ASSOCIATION OF EMTS AND PARAMEDICS (IAEP)/NAGE/SEIU LOCAL 5000 or any other labor organization.

WE WILL NOT withhold and continue to withhold wage increases, linked to your performance evaluations, from you because you engaged in union activities, and to discourage you from engaging in union activities.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL make whole all employees who would have received wage increases linked to their performance evaluations who were not granted wage increases from November 2013 through the present.

Elite Ambulance Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11150 West Olympic Boulevard, Suite 700, Los Angeles, CA 90064-1824
(310) 235-7351, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-122353 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7424.